



1410-72-P

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 387

[Docket No. 15-CRB-0010-CA-S]

Adjustment of Cable Statutory License Royalty Rates

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Proposed rule; modified.

SUMMARY: The Copyright Royalty Judges (Judges) publish for comment modified proposed regulations to require affected cable systems to pay a separate per-telecast royalty (a Sports Surcharge) in addition to the other royalties that those cable systems must pay under Section 111 of the Copyright Act.

DATES: Comments and objections are due no later than [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments and objections, identified by docket number 17-CRB-0001-BER (2019-2023), by any of the following methods:

CRB's electronic filing application: Submit comments online in eCRB at

<https://app.crb.gov/>.

U.S. mail: Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977; or

Overnight service (only USPS Express Mail is acceptable): Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977; or

Commercial courier: **Address** package to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM-403, 101 Independence Avenue SE,

Washington, DC 20559-6000. **Deliver to:** Congressional Courier Acceptance Site, 2nd Street NE and D Street NE, Washington, DC; or

Hand delivery: Library of Congress, James Madison Memorial Building, LM-401, 101 Independence Avenue SE, Washington, DC 20559-6000.

Instructions: Unless submitting online, commenters must submit an original, two paper copies, and an electronic version on a CD. All submissions must include a reference to the CRB and this docket number. All submissions will be posted without change to eCRB at <https://app.crb.gov/> including any personal information provided.

Docket: For access to the docket to read submitted background documents or comments, go to eCRB, the Copyright Royalty Board's electronic filing and case management system, at <https://app.crb.gov/> and search for docket number 15-CRB-0010-CA-S.

FOR FURTHER INFORMATION CONTACT: Anita Blaine, CRB Program Specialist, by telephone at (202) 707-7658 or e-mail at crb@loc.gov.

SUPPLEMENTARY INFORMATION: On July 2, 2018, the Copyright Royalty Judges (Judges) received a motion from the Joint Sports Claimants (JSC),¹ the NCTA-The Internet and Television Association, and the American Cable Association, notifying the Judges that they reached agreement on a modified sports surcharge rule and requesting the Judges adopt the rule. *Joint Motion of the Participating Parties to Suspend Procedural Schedule and to Adopt Modified Settlement* at 1 (Jul. 2, 2018) (Joint Motion). The Judges had published an earlier version of the proposed rule in the *Federal Register* at 82 FR 24611 (May 30, 2017) and a request for reply and surreply comments

¹ The Joint Sports Claimants are the Office of the Commissioner of Baseball, the National Football League, the National Basketball Association, the Women's National Basketball Association, the National Hockey League, and the National Collegiate Athletic Association.

regarding that version at 82 FR 44368 (Sept. 22, 2017).

The moving parties also requested that the Judges suspend, pending resolution of the Joint Motion, the procedural schedule set forth in the *Order Reinstating Case Schedule* dated January 18, 2018, and that the Judges publish the modified proposed rule expeditiously. On July 20, 2018, the Judges issued an order suspending the proceeding schedule, pending their review of the moving parties' agreement and publication of the modified proposed rule for public comment. The Judges stated that they would defer decision on adoption of the settlement agreement and termination of the proceeding until after they consider comments, if any, filed in response to publication of the modified proposed rule.

A. Background

Section 111(d)(1)(B) of the Copyright Act (the Act), 17 U.S.C. 111(d)(1)(B), sets forth the royalty rates that "Form 3" cable systems must pay to retransmit broadcast signals pursuant to the Section 111(c) statutory license. Form 3 systems are those with semi-annual "gross receipts" greater than \$527,600. *See id.* §§ 111(d)(1)(B), (E) & (F); 37 CFR 201.17(d). Section 801(b)(2)(C) of the Act provides:

In the event of any change in the rules and regulations of the Federal Communications Commission ["FCC"] with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(1)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

17 U.S.C. 801(b)(2)(C).

Section 804(b)(1)(B) of the Copyright Act states that, in "order to initiate

proceedings under section [801(b)(2)(C)],” an interested party must file a petition with the Judges requesting a rate change within twelve months of the FCC’s action. 17 U.S.C. 804(b)(1)(B); *see* H.R. Rep. No. 94-1476 at 178 (1976) (right to seek review “exercisable for a 12 month period following the date such changes are finally effective”). The FCC adopted sports exclusivity rules for cable systems in 1975. *See Report and Order in Doc. No. 19417*, 54 F.C.C.2d 265 (1975) (“Sports Rules”). The FCC repealed the Sports Rules effective November 24, 2014. *See Sports Blackout Rules*, 79 FR 63547 (Oct. 24, 2014) (Sports Rule Repeal). At the time of the Sports Rule Repeal, the Sports Rules were codified at 47 CFR 76.111 (2014).

On November 23, 2015, JSC filed a rate adjustment petition pursuant to Section 801(b)(2)(C) of the Copyright Act. In June 2016 the Judges established a procedural schedule for ruling on the JSC petition. *Order of Bifurcation . . . and Scheduling Order* (June 2016 Order). While the moving parties were unable to settle this matter during the voluntary negotiation period established by the June 2016 Order, they continued negotiations and agreed that this proceeding should be terminated with the adoption of a proposed rule.

Upon motion of the Participants in January 2017, the Judges published the proposed rule and received comments. *See* 82 FR 24611 (May 30, 2017). The Judges then published, in September 2017, a request for further comments on the proposed rule. *See* 82 FR 44368. After reviewing reply and surreply comments, they declined to adopt the proposed rates and reinstated a case schedule. *Order Reinstating Case Schedule* (Jan. 12, 2018).

In declining to adopt the proposed settlement the Judges noted that

The applicable license in this proceeding is the license to retransmit by cable beyond the local service area the works of “any ... owner whose work was included in a secondary transmission made by a cable system ... in whole or in part...” 17 U.S.C. § 111 (d)(3). [Major League Soccer (MLS)] and potentially other professional sports leagues are owners of, or represent owners of, copyrights to televised professional team sports events. The regulations proposed by the JSC define an “eligible professional sports event” to include *only* professional baseball, basketball (men and women), football, and hockey. By definition, MLS and any other professional league scheduling team sports events for telecast (and retransmission by those affected cable systems) would be ineligible to receive any portion of the sports programming surcharge negotiated by the JSC and cable providers. This proposed regulatory configuration provides for licensing royalties from Form 3 cable systems for some sports leagues to the express exclusion of other leagues that own or represent owners of protected works.

As proposed, the regulation for the exclusive benefit of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, and the Women’s National Basketball Association is contrary to the applicable section 111 license. The Judges decline to adopt the proposed settlement as a basis for regulations that would bind non-participants to a zero rate.

Order Reinstating Case Schedule at 2.

In April 2018, MLS filed a late Petition to Participate (PTP) and accompanying motion for the Judges to accept it. The Judges granted the motion and accepted the PTP on July 20, 2018.

In July 2018, the participants filed a modified proposed rule that addressed the Judges’ concerns regarding the proposed rule. Joint Motion at 4, 8. MLS does not object to the modified proposed rule. *Id.* at 2. The Judges hereby publish it for comment.

B. Scope of the Modified Proposed Rule

According to the moving parties, the modified proposed Sports Surcharge differs

from the January 2017 proposal in two key respects: a cable operator's obligation to pay a Sports Surcharge royalty is not limited to retransmissions of sports events affiliated with specific JSC members;² and the modified Sports Surcharge includes language expressly stating that no copyright owner of a retransmitted telecast of a sports event is precluded from seeking Sports Surcharge royalties if the retransmission would have been subject to deletion under the former FCC Sports Blackout Rule. Joint Motion at 2.

The moving parties also state that "nothing in the proposed rule would require the Judges to distribute the Sports Surcharge royalties" only to sports organizations whose telecasts trigger the "pay-in" obligation. Rather, "[t]he determination of the recipients of those royalties (and the amount of royalties those recipients should receive) would be addressed by the Judges in future allocation and distribution proceedings" absent a settlement. *Id.* at 4. As modified, the rule draws a bright line between the "pay-in" methodology by which affected cable systems will compute their surcharge royalty payment obligations and the "pay out" process by which those royalty payments are distributed. *Id.* at 5.

According to the moving parties, the modified Sports Surcharge does not change the previously agreed upon per event royalty rate of 0.025 percent of an affected cable system's gross receipts. Moreover, the definition of which cable systems may have to pay the surcharge has not changed (*i.e.*, systems that would have been subject to the FCC Sports Blackout Rule prior to its repeal).

Under the modified rule, a cable system's retransmission of a sports event telecast

² Under the January 2017 proposal the cable operator's obligation to pay Sports Surcharge royalties was limited to retransmissions of telecasts of sports events affiliated with specific JSC members. Joint Motion at 5.

that would have been subject to deletion under the FCC Sports Blackout Rule triggers a Sports Surcharge pay-in by the system's operator – as long as the holder of the broadcast rights in the event (or its agent) provides the affected system: (1) written notice containing information comparable to that required to invoke the former FCC Sports Blackout Rule; and (2) documentary evidence that the sports entity giving the notice required to trigger the Sports Surcharge pay-in provision previously invoked the FCC Sports Blackout Rule between January 1, 2012 and November 23, 2014 (the day before the repeal of the rule took effect). Joint Motion at 6.

With respect to certain collegiate events, the pay-in rule caps the maximum number of events involving a specific team that can trigger an affected cable system's surcharge payment obligation in a particular accounting period based on the largest number of events as to which the FCC Sports Blackout Rule was invoked by that specific sports entity during any of the accounting periods occurring during the January 1, 2012 through November 23, 2014 period. *Id.* at n.12.

In addition, the Joint Motion proposes a new effective date in 2019 and points out that the rule proposal can be reconsidered in 2020 pursuant to statute. *Id.* at 2 n.6; *see* 17 U.S.C. 804(b)(1)(B).

According to the moving parties, the royalty rate reflected in the modified proposed rule represents a negotiated compromise regarding adoption of a royalty surcharge and limiting when licensors must pay it, but not regulating the method of determining how the funds should be distributed. *Id.* at 6-7.

The moving parties state that they do not intend for the agreed-upon methodology for calculating a cable system's pay-in obligation to be accorded any

precedential effect or to be regarded as representing any agreement as to the fair market value, now or in the future, of the secondary transmission of any sports event or of the economic or other impact of the repeal of the FCC Sports Blackout Rule. Joint Motion at 6. The moving parties state that if the Judges do not adopt the proposed rule, each of the moving parties reserves the right to seek to demonstrate that the Sports Surcharge originally proposed is not contrary to law and/or that the Judges should adopt a different rate adjustment to account for the repeal of the FCC Sports Blackout Rule. *Id.* at 8 n.13.

C. The Judges' Authority to Adopt the Proposed Rule

According to the moving parties, "a key Congressional objective underlying the Judges' rate-setting authority is the promotion of voluntary settlements rather than litigation." *Id.* at 7, citing H.R. Rep. No. 108-408 at 24 (2004) (referring to the legislative policy of "facilitating and encouraging settlement agreements for determining royalty rates"). Consistent with that objective, the Judges may accept a settlement reached by "some or all of the participants" in a rate proceeding "at any time during the proceeding." 17 U.S.C. 801(b)(7)(A).

The Act requires that the Judges afford those who "would be bound by the terms, rates or other determination" in a settlement agreement "an opportunity to comment on the agreement." 17 U.S.C. 801(b)(7)(A)(i). The Copyright Royalty Board rules also require that the Judges "publish the settlement in the Federal Register for notice and comment from those bound by the terms, rates, or other determination set by the agreement." 37 CFR 351.2(b)(2).

D. Solicitation of Comments

The Judges seek comments on the moving parties' proposal. In particular, the

Judges seek comment on whether the proposal is consistent with Section 111 of the Copyright Act which provides that the applicable license granted in that section is the license to retransmit by cable beyond the local service area the works of “any ... owner whose work was included in a secondary transmission made by a cable system ... in whole or in part....” 17 U.S.C. § 111(d)(3), and consistent with the Judges’ interpretation of that section as elaborated in the Order Reinstating Case Schedule.

In addition to general comments for or against the proposal, the Judges seek comment on whether the proposed provision in section 387.2 (e)(9) (“Nothing herein shall preclude any copyright owner of a live television broadcast, the secondary transmission of which would have been subject to deletion under the FCC Sports Blackout Rule, from receiving a share of royalties paid pursuant to this paragraph.”) could apply to the secondary transmissions of the live television broadcasts of any entity *other than* a current member of the JSC.³ In other words, would the phrase “the secondary transmission of which would have been subject to deletion under the FCC Sports Blackout Rule” enable any entity beyond the current members of the JSC to qualify for a share of royalties from the Sports Surcharge? If the answer is yes, which entities’ transmissions would qualify for a share? If the answer is no (*i.e.*, only JSC members could qualify), then is the current proposal nevertheless still consistent with the Section 111 license? If so, why?

Interested parties may comment and object to the modified proposed regulations contained in this notice. Such comments and objections must be submitted no later than [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL

³ See note 1, *supra*.

REGISTER].

List of Subjects in 37 CFR Part 387

Copyright, Cable Television, Royalties

Modified Proposed Regulations

For the reasons set forth in the preamble, and under the authority of chapter 8, title 17, United States Code, the Copyright Royalty Judges proposes to amend 37 CFR chapter III as follows:

PART 387—ADJUSTMENT OF ROYALTY FEE FOR CABLE COMPULSORY LICENSE

1. The authority citation for part 387 continues to read as follows:

Authority: 17 U.S.C. 801(b)(2), 803(b)(6).

2. Amend §387.2 by:

a. Redesignating paragraph (e) as paragraph (f) and

b. Adding a new paragraph (e) to read as follows:

§ 387.2 Royalty fee for compulsory license for secondary transmission by cable systems.

(e) *Sports programming surcharge.* Commencing with the first semiannual accounting period of 2019 and for each semiannual accounting period thereafter, in the case of an affected cable system filing Form SA3 as referenced in 37 CFR 201.17(d)(2)(ii) (2014), the royalty rate shall be, in addition to the amounts specified in paragraphs (a), (c) and (d) of this section, a surcharge of 0.025 percent of the affected cable system's gross receipts for the secondary transmission to subscribers of each live television broadcast of

a sports event where the secondary transmission of such broadcast would have been subject to deletion under the FCC Sports Blackout Rule. For purposes of this paragraph,

(1) The term “cable system” shall have the same meaning as in 17 U.S.C.

111(f)(3);

(2) An “affected cable system” (i) is a “community unit,” as the comparable term is defined or interpreted in accordance with §76.5(dd) of the rules and regulations of the Federal Communications Commission in effect as of November 23, 2014, 47 CFR 76.5(dd) (2014);

(ii) that is located in whole or in part within the 35-mile specified zone of a television broadcast station licensed to a community in which a sports event is taking place, provided that if there is no television broadcast station licensed to the community in which a sports event is taking place, the applicable specified zone shall be that of the television broadcast station licensed to the community with which the sports event or team is identified, or, if the event or local team is not identified with any particular community, the nearest community to which a television station is licensed; and

(iii) whose royalty fee is specified by 17 U.S.C. 111(d)(1)(B);

(3) A “television broadcast” of a sports event must qualify as a “non-network television program” within the meaning of 17 U.S.C. 111(d)(3)(A);

(4) The term “specified zone” shall be defined as the comparable term is defined or interpreted in accordance with §76.5(e) of the rules and regulations of the Federal Communications Commission in effect as of November 23, 2014, 47 CFR 76.5(e) (2014);

(5) The term “gross receipts” shall have the same meaning as in 17 U.S.C.

111(d)(1)(B) and shall include all gross receipts of the affected cable system during the

semiannual accounting period except those from the affected cable system's subscribers who reside in (i) the local service area of the primary transmitter, as defined in 17 U.S.C. 111(f)(4);

(ii) any community where the cable system has fewer than 1000 subscribers;

(iii) any community located wholly outside the specified zone referenced in paragraph (e)(4) above; and

(iv) any community where the primary transmitter was lawfully carried prior to March 31, 1972;

(6) The term "FCC Sports Blackout Rule" refers to §76.111 of the rules and regulations of the Federal Communications Commission in effect as of November 23, 2014, 47 CFR 76.111 (2014);

(7) Subject to paragraph (e)(8) of this section, the surcharge will apply to the secondary transmission of a primary transmission of a live television broadcast of a sports event only where the holder of the broadcast rights to the sports event or its agent has provided the affected cable system

(i) advance written notice regarding such secondary transmission as required by §76.111(b) and (c) of the FCC Sports Blackout Rule and

(ii) documentary evidence that the specific team on whose behalf the notice is given had invoked the protection afforded by the FCC Sports Blackout Rule during the period from January 1, 2012, through November 23, 2014;

(8) In the case of collegiate sports events, the number of events involving a specific team as to which an affected cable system must pay the surcharge will be no greater than the largest number of events as to which the FCC Sports Blackout Rule was

invoked in a particular geographic area by such team during any one of the accounting periods occurring between January 1, 2012, and November 23, 2014;

(9) Nothing herein shall preclude any copyright owner of a live television broadcast, the secondary transmission of which would have been subject to deletion under the FCC Sports Blackout Rule, from receiving a share of royalties paid pursuant to this paragraph.

Dated: July 24, 2018.

Jesse M. Feder,
Copyright Royalty Judge

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